

JOSE GOMEZ, JR.
Claimant

AMERICOLD
Respondent

WAUSAU INSURANCE COMPANIES
Insurance Carrier

[illegible]

ISSUES

The Administrative Law Judge awarded claimant benefits for a functional impairment rating to the body of thirty-four percent (34%). The claimant requested this review and contends he is permanently and totally disabled. Although claimant indicated in his brief he desired the Appeals Board to enter an order regarding division of attorney fees among other attorneys and that he also contested an order of Involuntary Assignment of Compensation entered by the Wyandotte County District Court, these issues were dismissed for purposes of this appeal.

The sole issue before the Appeals Board on this review is nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Award of the Administrative Law Judge should be affirmed.

Only July 15, 1989, claimant sustained injuries to his left leg, low back, and right wrist when a truck loaded with rock he was driving for the respondent struck a stone pillar, shattering the windshield, caving in the left side of the truck, and pinning claimant in the cab. The fire department took approximately two and one-half (2 1/2) hours to extricate claimant from the wreckage. The injury to claimant's leg was quite severe as it resulted in an open, comminuted fracture of the left tibia and devascularization of the soft tissue due to the involvement of the popliteal artery. Claimant underwent extensive surgery. The accident also caused musculoligamentous injury to the lumbosacral spine with residual involvement and a fracture of the right carpal lunate with some residual involvement of the right wrist.

Board certified orthopedic surgeon Nathan Shechter, M.D., who was selected by the Administrative Law Judge to perform an independent medical evaluation, believes claimant has a thirty-four percent (34%) impairment of function to the body as a whole due to the permanent injuries to the low back, left leg and right wrist claimant sustained in this accident. The Appeals Board adopts Dr. Shechter's opinion to the extent of permanent impairment of function claimant has sustained.

Claimant contends he is permanently and totally disabled. The Appeals Board finds the evidence fails to prove that it is more probably true than not claimant has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment as required by K.S.A. 1989 Supp. 44-510c. Although the Appeals Board believes claimant did sustain severe injury and is now unable to perform heavy, physical manual labor, it appears claimant retains the ability to perform sedentary work and those light occupations that do not require extensive standing or walking. Claimant was not working at the time of the regular hearing but, as claimant testified, he is not looking for employment, nor desires any employment that pays less than the more than \$527.00 per week he earned while working for respondent. Also, claimant advised the vocational rehabilitation specialist he was not interested in working anywhere if he could not return to work for the respondent operating the crusher, a sedentary job that consisted of sitting and observing the machine that feeds itself rocks which are then broken up. No labor

market expert was presented to provide testimony regarding loss of ability to work in terms of the open labor market nor how the injuries may have affected his ability to earn wages.

Because claimant failed to present evidence regarding loss of ability to perform work in the open labor market and loss of ability to earn comparable wages, the Administrative Law Judge awarded claimant benefits based upon functional impairment only. The Appeals Board agrees with the analysis and finding of the Administrative Law Judge.

Claimant bears the burden of proof to establish his claim. "Burden of proof" is defined in K.S.A. 44-508(g) as " . . . the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is:

" . . . on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of facts shall consider the whole record." K.S.A. 44-501(a).

Because he has sustained a "nonscheduled injury", claimant is entitled permanent partial general disability benefits under the provisions of K.S.A. 1989 Supp. 44-510e. The statute provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

Because claimant has failed to prove he has experienced a work disability greater than his functional impairment of thirty-four percent (34%), claimant is entitled to permanent partial disability benefits based upon that thirty-four percent (34%) rating.

The Appeals Board adopts the findings of the Administrative Law Judge set forth in the Award that are not inconsistent with the specific findings made herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer, dated January 23, 1995, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas T. O'Neill, Kansas City, Kansas
David Bogdan, Kansas City, Missouri
Alvin E. Witwer, Administrative Law Judge
George Gomez, Director